

SEP 18 1998

FEDERAL COMMUNICATIONS  
COMMISSION

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of	)	
	)	
GTE Telephone Operating Companies	)	CC Docket No. 98-79
Tariff FCC No. 1	)	
Transmittal No. 1148	)	
BellSouth Telecommunications, Inc.	)	
BellSouth Tariff FCC No. 1	)	CC Docket No. 98-161
Transmittal No. 476	)	
Pacific Bell	)	
Pacific Tariff FCC No. 128	)	CC Docket No. 98-103
Transmittal No. 1986	)	

**COMMENTS OF AMERICA ONLINE, INC. ON  
DIRECT CASES IN SUPPORT OF DSL TARIFF TRANSMITTALS**

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America Online, Inc. ("AOL"), by its attorneys, hereby files its response to the Direct Cases submitted by the local exchange carriers ("LECs") GTE Telephone Operating Companies ("GTE"), BellSouth Telecommunications, Inc. ("BellSouth"), and Pacific Bell ("Pacific") (collectively, the "Filing LECs") in connection with the above-referenced tariff transmittals for Digital Subscriber Line ("DSL") services.<sup>1/</sup> AOL filed Petitions to Suspend and Investigate each of these tariff filings.<sup>2/</sup> For the reasons set forth herein, AOL submits that the record before the

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<sup>1/</sup> GTE Telephone Operating Companies GTOC Tariff FCC No. 1 GTOC Transmittal No. 1148, CC Docket No. 98-79, Direct Case of GTE (dated Sept. 8, 1998) ("GTE Direct Case"); BellSouth Telecommunications, Inc. BellSouth Tariff FCC No. 1 BellSouth Transmittal No. 476, CC Docket No. 98-161, Direct Case (dated Sept. 11, 1998) ("BellSouth Direct Case"); Pacific Bell Telephone Company Pacific Bell Tariff FCC No. 128 Pacific Bell Transmittal No. 1986, CC Docket No. 98-103, Direct Case of Pacific Bell (dated Sept. 11, 1998) ("Pacific Bell Direct Case").

<sup>2/</sup> GTE System Telephone Companies GTSC Tariff FCC No. 1, Transmittal No. 260, GTE ADSL Service, Transmittal No. 260, Petition of America Online, Inc. to Suspend and Investigate the GTE System Telephone Companies' GTE DSL Solutions-ADSL Service Tariff, (dated May 22, 1998); BellSouth Telecommunications, Inc.,

Commission is sufficient for the Commission to permit federal tariffing of DSL services. AOL further submits, however, that the record does not support, nor should the FCC reach, any broader legal conclusions or jurisdictional rulings with respect to the status of DSL services and the assertion of exclusive federal jurisdiction over such services.

## INTRODUCTION AND SUMMARY

In their tariff transmittals, each of the Filing LECs characterize their DSL service offerings as “interstate access” services. Numerous petitioners, including AOL, sought suspension and investigation of these tariffs because, among other grounds, the proposed tariffs presented serious jurisdictional issues warranting a full inquiry by the Commission.<sup>3/</sup> In designating the instant issue for investigation with respect to each of these transmittals, the Commission found that the record with regard to each transmittal did “not contain sufficient information” to determine whether the DSL service offering was “an interstate service, properly tariffed at the federal level, or an intrastate service that should be tariffed at the state level.”<sup>4/</sup> Significantly, the Direct Cases submitted by the Filing LECs consist almost exclusively of legal arguments and generic descriptions of how the Internet works, which the FCC already knows

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Tariff FCC No. 1, Transmittal No. 476, BellSouth ADSL Service, Transmittal No. 476, Petition of America Online, Inc. to Suspend and Investigate the BellSouth Telecommunications, Inc. ADSL Service Tariff, (dated Aug. 25, 1998); Pacific Bell Telephone Company Pacific Tariff FCC No. 128, Transmittal No. 1986, Pacific’s ADSL Service, Transmittal No. 1986, Petition of America Online, Inc. to Suspend and Investigate the Pacific Bell Telephone Company’s ADSL Service Tariff, (dated June 22, 1998).

<sup>3/</sup> Id.

<sup>4/</sup> GTE Telephone Operators GTOC Tariff No. 1 GTOC Transmittal No. 1148, CC Docket No 98-79, Order Designating Issues For Investigation, at ¶ 12 (Common Carrier Bureau, released Aug. 20, 1998) (“GTE Designating Order”); Bell South Telecommunications, Inc. Bell South Tariff FCC No. 1 Bell South Transmittal No. 476, CC Docket No. 98-161, Order Suspending Tariff and Designating Issues For Investigation, at ¶ 10 (Common Carrier Bureau, released Sept. 1, 1998) (“Bell South Designating Order”); Pacific Bell Telephone Company Pacific Bell Tariff FCC No. 128 Pacific Transmittal No. 1986, CC Docket No. 98-103, Order Designating Issues For Investigation, at ¶ 10 (Common Carrier Bureau, released Sept. 2, 1998) (“Pacific Bell Designating Order”).

well, rather than particular information with respect to likely uses of DSL services that might inform better the Commission's jurisdictional decision.

Despite the lack of factual information, review of the Direct Cases reveals that the LECs are nonetheless seeking far-reaching holdings from the Commission with regard to the jurisdictional and regulatory status of DSL services, including a broad ruling that the FCC enjoys exclusive jurisdiction over DSL services, and that such services should be tariffed exclusively at the federal level. Given the posture in which this issue arises, AOL submits that the only issue which the FCC must resolve is whether it has any jurisdiction over these proposed DSL service offerings, and whether these services may be properly tariffed at the federal level. The answer, based upon the nature of the offerings and Commission precedent, is yes.

As a threshold matter, an examination of the nature of the proposed DSL services and the uses to which they will likely be put reveals that the Commission has ample jurisdiction over the proposed DSL services, since at least some of the uses of these services will be interstate in nature. Indeed, the Commission has consistently recognized that services like DSL, which may have both intrastate and interstate uses, are subject to its jurisdiction. In fact, under these "mixed use" circumstances, the FCC may in its reasonable discretion, and as sound policy considerations dictate, choose to assert exclusive federal jurisdiction over the tariffing of such services, provide for concurrent federal and state jurisdiction and tariffing (as it has in other contexts, including in its access charge and ONA regimes), or even permit exclusive state tariffing of mixed use services. Given the record before it, the lack of experience with this emerging service, and the far-reaching implications of a broader jurisdictional holding for other FCC dockets, the FCC need not, and should not, use these proceedings to anticipate and address all tariffing and jurisdictional issues that DSL services could raise. Instead, the FCC should hold only that the

proposed federal tariffing of DSL services by the Filing LECs is permissible. Any further issues with regard to the relationship between federal and state jurisdiction over DSL services can be addressed, if necessary, as they arise.

Finally, these Direct Cases reinforce AOL's concern, expressed in its Petitions, that the Filing LECs may seek to use these tariff filings as vehicles to obtain implicit or explicit Commission legal findings that could form the basis for the LECs to argue, either before the Commission, before the states, and/or in appeals from Commission and state decisions, for the application of the full panoply of federal regulation to carrier offerings used by information service providers ("ISPs"), including the application of interstate interexchange carrier access charges. Significantly, in its most recent Designation Order addressing a further proposed DSL Tariff filing by GTE, the Commission has appropriately confirmed that its decision to allow federal DSL tariffs to become effective "should not be interpreted as affecting the jurisdictional and regulatory conclusions that the Commission has reached in other proceedings such as the access charge proceeding."<sup>51</sup> The FCC should ensure that any decision rendered in this proceeding also has no such spillover effect on other proceedings.

**I. WHILE THE RECORD DOES NOT SUPPORT A FINDING OF EXCLUSIVE FEDERAL JURISDICTION, THE FCC MAY PERMIT FEDERAL TARIFFING OF DSL SERVICES**

In their Direct Cases, the Filing LECs suggest that the Commission should assert exclusive jurisdiction over DSL services, finding that these services are predominantly or exclusively interstate in nature. Notably, not only does this position find no support in the record currently before the Commission, long standing Commission's precedent dealing with

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<sup>51</sup> GTE Telephone Operating Companies, GTOC Tariff No. 1, GTOC Transmittal No. 1172, CC Docket No. 98-79, Order, DA 98-1837, at ¶ 2, n.7 (released September 11, 1998).

“jurisdictionally mixed” use services, both in the context of enhanced or information services and elsewhere, is to the contrary. In fact, FCC precedent confirms that under such circumstances, the Commission enjoys reasonable discretion to regulate in the public interest. As the Eighth Circuit Court of Appeals recently held in affirming the FCC’s decision not to impose interstate interexchange carrier access charges on ISPs, the FCC has discretion to fashion different regimes for “jurisdictionally mixed” services in the sound exercise of its expert judgment.<sup>6/</sup>

Indeed, under the circumstances presented by services such as DSL, the FCC could, after careful consideration of a full factual record, assert exclusive federal jurisdiction, permit concurrent federal and state jurisdiction, or even allow tariffing and regulation of such services at the state level. Within this framework, the Filing LECs’ voluminous arguments about the “inseverability” of interstate and intrastate communications in connection with DSL services do nothing more than establish that the FCC has jurisdiction over DSL services, and that federal tariffing and regulation is permissible.<sup>7/</sup> AOL submits that for purposes of this proceeding, the FCC need only, and should only, address here whether federal tariffing of “mixed use” DSL services is permissible, not whether its federal jurisdiction is exclusive and whether the states should be precluded from requiring intrastate filing of DSL service tariffs. In fact, given the nascent nature of this service, the record before the FCC, and the limited experience with use of DSL services in the marketplace, any further conclusion would be premature.

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<sup>6/</sup> As the Court observed,

the FCC has determined that the facilities used by ISPs are “jurisdictionally mixed,” carrying both interstate and intrastate traffic. FCC Brief at 79. Because the FCC cannot reliably separate the two components involved in completing a particular call, or even determine what percentage of overall ISP traffic is interstate or intrastate, see id. (noting that at least some ISP services are purely intrastate and not susceptible to FCC regulation), the Commission has appropriately exercised its discretion to require an ISP to pay intrastate charges for its line and to pay the [federal subscriber line charge] . . . .

Southwestern Bell Telephone Co. v. FCC, No. 97-2618, slip op., p.41 (8<sup>th</sup> Cir. Aug. 19, 1998).

<sup>7/</sup> GTE Direct Case, at 15; BellSouth Direct Case, at 13; Pacific Bell Direct Case, at 4.

The record before the FCC amply supports a decision that DSL services may be utilized in some part in connection with interstate communications. First, as the Filing LECs correctly point out, an undetermined percentage of DSL traffic will likely be Internet traffic that may well be interstate or international in nature. While it is impossible to discern the percentage of overall traffic that may be interstate or intrastate, AOL agrees that certainly, at least one significant application of DSL services will be for the transmission of Internet services and that some of that traffic will be interstate.

The record also makes clear, however, that there are purely intrastate uses of DSL services. First, not all uses of DSL services to access Internet and online services will be interstate. A user could, for example, connect only to a local ISP, access a web site on a server within the same state, or retrieve information stored locally, e.g., when ISPs “cache” popular web sites at their home locations. Moreover, there are other uses of DSL altogether. As Pacific Bell indicates, “a typical application for Pacific’s ADSL service would be ‘work at home’ where a subscriber could connect to a corporate local area network to access her employer’s Intranet and her work computer.”<sup>8/</sup> Similarly, it is easy to imagine demand for DSL connections for high volume data transmissions between multiple offices of a single business within a single state or, for example, between a business and one of its major vendors, which involve no access to the Internet, or any interstate components. Pacific Bell further observes that “work at home use of ADSL might consist of pure intrastate traffic or no more than a *de minimis* amount of interstate traffic, thus making a purchase from intrastate tariffs entirely appropriate.”<sup>9/</sup> AOL agrees. Simply put, there is no factual information in the record as to relative levels of demand for DSL

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<sup>8/</sup> Pacific Bell Direct Case, at 2.

<sup>9/</sup> Id.



services on an interstate or intrastate basis, regardless of the assertions of the Filing LECs. It is clear only that DSL services are “jurisdictionally mixed,” similar to the conclusion the FCC reached regarding the use of dial-up services by ISPs in the access charge context.<sup>10/</sup>

In the context of such mixed use services, legal precedent supports a range of regulatory options. For example, in the access charge context, the FCC found that ISPs use the network in an analogous manner to other local customers, whether banks, radio stations, or pizza parlors,<sup>11/</sup> and thus may be treated in the same fashion as local service users.<sup>12/</sup> As such, ISPs are permitted to take service under state business line tariffs, subject to state regulation and to payment of the federal subscriber line charge.<sup>13/</sup> ISPs also have the right, however, to take service under federal tariffs. The Eighth Circuit recently affirmed the FCC’s authority to implement this regime, finding it a reasonable approach to the tariffing of “jurisdictionally mixed” services.<sup>14/</sup>

The Commission also took a similar approach in its Open Network Architecture proceedings, designed to ensure the non-discriminatory provision of Bell Operating Company (“BOC”) services and capabilities to competing, unaffiliated ISPs.<sup>15/</sup> There, the Commission found that ISPs “use ONA services on both an interstate and intrastate basis” and generally required the BOCs to provide ONA services through federal tariffs. Yet, despite the important

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<sup>10/</sup> Southwestern Bell Telephone Co., No. 97-2618, supra, slip op., at p.41.

<sup>11/</sup> Access Charge Reform Price Cap Performance Review for Local Exchange Carriers Transport Rate Structure and Pricing End User Common Line Charges, First Report and Order, 12 FCC Rcd 15982 (1997) (“Access Charge Reform Order”).

<sup>12/</sup> Id. Indeed, it is for this reason that some carriers that have offered DSL services to date have understood the need to comply with relevant state regulatory provisions regarding their proposed services, including the filing of intrastate tariffs to the extent relevant state law requires them to do so.

<sup>13/</sup> Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631, n.8, 53 (1988).

<sup>14/</sup> Southwestern Bell Telephone Co., No. 97-2618, supra, slip op., at p.41.

<sup>15/</sup> Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, 4 FCC Rcd 1, 143-44 (1988) (“ONA Memorandum Opinion and Order”).

federal objectives underlying ONA, the FCC nonetheless allowed state tariffing of ONA services, expressly rejecting arguments that the inseverability of interstate and intrastate uses of ONA services required exclusive federal jurisdiction and preemption of the states.<sup>16/</sup>

Further, the Commission's "ten percent rule" for jurisdiction over mixed interstate and intrastate private line services, while not requiring a particular outcome here, also confirms FCC jurisdiction and discretion over mixed use services. Historically, all private lines that carried any interstate traffic were assigned to the federal jurisdiction. Since 1989, however, incumbent LECs have been allowed to tariff at the state level any private line on which the amount of interstate traffic is estimated to be less than 10 percent of the total traffic.<sup>17/</sup> Private line services used exclusively for intrastate purposes, on the other hand, are provided under state tariffs. While the ten percent rule confirms that federal tariffing of DSL services is permissible, the Filing LECs' further suggestion that this rule controls jurisdictional issues beyond its narrow confines is incorrect.<sup>18/</sup>

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<sup>16/</sup> The FCC observed that:

In reviewing the structures the BOCs propose for the tariffing of ONA services at the state level, we are sensitive both to the state's jurisdiction over intrastate basic services and to the need for meaningful implementation of our federal ONA policies. We are rejecting proposals that we require all ONA services to be offered exclusively in federal tariffs. We have sought to limit our actions concerning the BOCs' plans for such services to avoid intruding on state regulatory interests.

Id. at 162.

<sup>17/</sup> See MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Decision and Order, 4 FCC Rcd 5660 (1989) ("MTS and WATS Decision and Order").

<sup>18/</sup> Notably, the Filing LECs' characterize the FCC's actions in the traditional special access context into a flat rule they claim is applicable to the instant case that would require exclusive interstate treatment where interstate use constitutes more than ten percent of the traffic. As indicated above, prior to the adoption of the "ten percent rule," federal-state separations procedures provided that the costs of all mixed use facilities with any interstate usage whatsoever would be assigned to the federal jurisdiction. In addressing these cases, the Joint Board initially recommended adoption of the ten percent rule because customers were "evad[ing] state tariff regulation merely by adding *de minimis* amounts of interstate traffic to private lines carrying intrastate communications." The Joint Board found that the "typical situation involves physically intrastate systems carrying very small amounts of interstate traffic," and recommended the ten percent test because it would be "sufficient to address the existing problems." MTS and WATS Market Structure, Recommended Decision and Order, 4 FCC Rcd 1352, 1357

Finally, the Commission has exercised its discretion to permit the States to tariff other local services used in connection with both interstate and intrastate traffic, including circumstances where it is not feasible to separate the interstate and intrastate components of the service. For example, vertical services (such as call-waiting or Caller ID) are used in connection with both interstate and intrastate calls. As a result, the FCC could insist on federal tariffing of these services – at least to the extent that they are used in connection with interstate telephone calls. The FCC, however, has allowed the States to exercise exclusive jurisdiction over these services.<sup>19/</sup> The same is true of Centrex services, a network-based service that allows business users to have many of the same features as a premises-based switch.<sup>20/</sup>

Notably, the Filing LECs rely upon many of these Commission decisions to support their assertion of federal jurisdiction over DSL services. While AOL agrees that such an assertion of FCC jurisdiction over DSL services is appropriate, none of the precedent relied upon by the Filing LECs suggests that assertion of exclusive federal jurisdiction over the nascent DSL service is required. Nor have the Filing LECs demonstrated either a sound legal or public policy basis for exclusive jurisdiction based upon the facts currently before the Commission. Indeed, such a ruling is entirely unnecessary. The Commission should only resolve the issue before it, and permit federal tariffing of DSL services.

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(Federal State Joint Board, 1989) (“MTS and WATS Recommended Decision and Order”). In adopting the Joint Board’s recommendation, the Commission also adopted its narrow rationale for the rule. MTS and WATS Decision and Order, 4 FCC Rcd at 5660. Nowhere in either decision is there a suggestion that either the Joint Board, or the FCC, viewed the ten percent rule as anything more than a specific fix to a specific federal-state problem, much less an immutable rule for federal jurisdiction generally.

<sup>19/</sup> ONA Memorandum Opinion and Order, 4 FCC Rcd at 40-49, 144-46.

<sup>20/</sup> See Illinois Bell Telephone v. FCC, 883 F.2d 104, 114 (D.C. Cir. 1989) (While 100 percent of the cost of Centrex services is recovered through state tariffs, this “accounting treatment does not negate the mixed interstate-intrastate character” of the service.).

## **II. THE COMMISSION SHOULD NOT RESOLVE LEGAL ISSUES WHICH MAY AFFECT OTHER PROCEEDINGS**

In supporting the interstate tariffing of DSL services, the Filing LECs' Direct Cases attempt to shoehorn DSL services into a number of existing, but ill-fitting, regulatory boxes. Indeed, while frequently disclaiming any intention to influence the outcome of other FCC proceedings regarding carrier offerings of services used by ISPs, the bulk of the Filing LECs' legal arguments appear designed to do just that, including their characterization of DSL services as traditional "interstate access" services. Not only do the available facts not support this characterization, the Commission need not resolve the issue of whether DSL services fall into this regulatory pigeonhole. In fact, as AOL has stressed, the FCC should not allow the DSL tariffing proceedings to be used to "game" the outcome of any other regulatory proceedings.

As the Commission has recognized in its advanced services proceedings,<sup>21/</sup> DSL services represent a potentially new generation of high-speed, high-capacity advanced services which may hold the promise of bringing higher bandwidth services to residential consumers and businesses of all sizes. Today, one likely use of these "advanced" services is high-speed residential and business access to facilitate faster and more efficient access to Internet and online services. Despite the fact that end users may utilize DSL services to "access" the Internet, however, it simply does not follow that DSL services are properly categorized as "interstate access" services as they have traditionally been described and regulated.

As an initial matter, the Commission need not, and should not, become embroiled in this definitional morass. Because there is little genuine dispute that DSL services will be used, at

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<sup>21/</sup> Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket 98-146, Notice of Inquiry, FCC 98-187 at ¶¶ 19-21 (released Aug. 7, 1998).

least in part, in connection with interstate transmission, it is clear that the FCC has jurisdiction over DSL services and that they may be tariffed at the federal level. This is so regardless of whether there is ultimately a determination that FCC jurisdiction is concurrent or exclusive. Indeed, such is the case whether the services are labeled “access” or not, as that term has historically been used.

Most importantly, the Filing LECs’ insistence that their DSL services are “interstate access” services appears to be an attempt to gather ammunition for LEC arguments in future FCC proceedings, state proceedings, or for appeals challenging future FCC and/or state decisions, that services used in conjunction with the Internet should be subject to the full panoply of regulation and charges applicable to “interstate access services,” including interexchange carrier access charges. The FCC should decline the Filing LECs’ invitation to engage in such definitional exercises. Instead, the FCC should find that DSL services are distinct from interstate access services historically offered to interexchange carriers and as such, should not be subject to the treatment applicable to those services. Moreover, the FCC should expressly state that nothing in its decision regarding its jurisdiction over DSL services will affect the regulatory treatment of other services used by ISPs, nor will it impact the resolution of other pending Commission proceedings.

## **CONCLUSION**

For the foregoing reasons, AOL respectfully submits that the Commission may find that federal tariffing of DSL services is permitted, but should avoid additional, unnecessary broad

jurisdictional determinations at this time. The Commission should also reaffirm that its acceptance of federal DSL tariffs in no way effects jurisdictional, regulatory and policy questions pending in other proceedings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Donna N. Lampert', written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I, Cheryl S. Flood, hereby certify that on this 18th day of September, 1998, I caused a copy of the foregoing "Comments Of America Online, Inc. On Direct Cases in Support of DSL Tariff Transmittals" to be sent by messenger (\*); by overnight delivery (^); or by first-class, postage prepaid, U.S. Mail, to the following:

  
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